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KENTUCKY'S CONCEPT OF INVOLUNTARY MANSLAUGHTER

Involutionary manslaughter, in Kentucky, is held to be the killing of another in doing some unlawful act not amounting to a felony, and not likely to endanger human life, and without intention to kill, or the killing of another while doing a lawful act in an unlawful or negligent manner, where the negligence is not such as to indicate a disregard of human life.¹

The decisions concerning involuntary manslaughter are entirely devoid of statutory guidance since Kentucky's sole statute venturing into the field of manslaughter is one establishing the punishment for voluntary manslaughter.

In *Sikes v. Commonwealth*,² the Court stated that involuntary manslaughter continues to be dealt with as a common law misdemeanor, punishable by fine or imprisonment in jail, or both, without limit. It seems, however, the common law did not regard involuntary manslaughter so lightly. Hawkins says that the only non-felonious homicides are those that are excusable or justifiable,³ and Blackstone is in accord that the crime amounts to felony.⁴ Bishop says, "In modern law, all homicides which are cognizable by the criminal courts are felonies."⁵

The *Sikes* case cites *Conner v. Commonwealth*⁶ in the paragraph of its decision defining involuntary manslaughter as a common law misdemeanor. Although the *Conner* case was cited for a different proposition, the ruling in the *Sikes* case is directly contra to the ruling in the *Conner* case on the classification of involuntary manslaughter. In the *Conner* case, the Court ruled that in Kentucky the court must look to the common law for the definition of involuntary manslaughter and that by the rules of the common law felonious homicide was divided into murder, voluntary manslaughter, and involuntary manslaughter. Furthermore, the court in the *Sikes* case makes no mention of the fact that their opinion contains a ruling which is contra to a ruling in a case which it had cited for authority.

The question arises, why does Kentucky rule that involuntary manslaughter is a common law misdemeanor? It is believed that an analysis of voluntary manslaughter will reveal the answer.

A general definition of voluntary manslaughter is that it "is a homicide committed with a real design to kill, but under such circumstances of provocation that the law, in its tenderness for human frailty, regards them as palliating the criminality of the act to some extent; as where one kills another in a fight arising upon a sudden quarrel, or upon mutual agreement, or in the heat of passion upon great provocation."⁷ Kentucky, not being satisfied with this inclusive definition,

¹ *Lewis v. Commonwealth*, 301 Ky. 268, 191 S.W. 2d 416 (1945); *Lowe v. Commonwealth*, 298 Ky. 7, 181 S.W. 2d 409 (1944); *Commonwealth v. Mullins*, 296 Ky. 190, 176 S.W. 2d 403 (1943); *Hunt v. Commonwealth*, 289 Ky. 527, 159 S.W. 2d 23 (1942); *Jones v. Commonwealth*, 213 Ky. 356, 281 S.W. 571 (1926).

KY. REV. STAT. sec. 435.020 (1948).

² See 304 Ky. 429, 439, 200 S.W. 2d 956, 959 (1947); *accord*, *Cornett v. Commonwealth*, 282 Ky. 322, 138 S.W. 2d 492 (1940); *Spriggs v. Commonwealth*, 113 Ky. 724, 68 S.W. 1087, 24 Ky. Law Rep. 540 (1902).

³ 1 HAWKINS P. C. 79.

⁴ BL. COMM. 193.

⁵ 2 BISHOP, CRIMINAL LAW sec. 617 (9th ed. 1923).

76 Ky. (13 Bush) 714 (1878).

⁶ MAY, CRIMINAL LAW sec. 168 at page 271 (4th ed. 1938); *Olds v. State*, 44 Fla. 452, 33 So. 296 (1902); *Ketring v. State*, 209 Ind. 618, 200 N.E. 212 (1936); *State v. Boston*, 233 Io. 1249, 11 N.W. 2d 407 (1943); *Neusbaum v. State*, 156

adds a killing which is the result of negligence variously described as gross,⁹ reckless,¹⁰ reckless or gross,¹¹ reckless disregard,¹² and reckless and wanton.¹³

It is difficult to logically sustain a classification of any negligent manslaughter as voluntary manslaughter since voluntary manslaughter is an intentional crime with the great weight of authority accepting the maxim that it must be effected with a real design to kill.¹⁴ Kentucky has, on occasion, attempted to justify her position with the defunct rationalization that a man is presumed to intend the consequences of his acts, and, thereby, a negligent manslaughter has been twisted into the voluntary branch of manslaughter.¹⁵ This argument falls before the fact that negligence, however gross, is never intent;¹⁶ and it is unnecessary since the crime of involuntary manslaughter was designed to cover negligent homicides not amounting to murder.¹⁷

It is believed, also, that the misnomer in certain instances of negligent manslaughter is the result of a justified desire on the part of courts to dispense justice commensurate with the crime involved, in spite of the fact that it isn't the result of careful application of rules of law. As has been observed, involuntary manslaughter is punished by fine and imprisonment in jail, a punishment that is not severe enough for the culpability involved in many negligent manslaughters. It is submitted that in certain cases those guilty of negligent manslaughter are sentenced under a voluntary manslaughter statute¹⁸ in order that the state might meet the exigencies of justice under a statute which affords a maximum sentence of 21 years in the penitentiary.¹⁹

Just as Kentucky probably deemed certain negligent manslaughters worthy of penitentiary punishment, it is believed that they probably also felt that the less revolting killings should deserve a relatively milder sentence. It is submitted that this purpose was accomplished by defining and punishing involuntary manslaughter as a common law misdemeanor.

Indeed, there is a residuum of negligent homicides which are punished as

Maryland 149, 143 Atl. 872 (1928); *State v. Evans*, 177 N.C. 564, 98 S.E. 788 (1919); *Commonwealth v. Carroll*, 326 Pa. 135, 191 Atl. 610 (1937).

⁹ *Newcomb v. Commonwealth*, 276 Ky. 362, 124 S.W. 2d 486 (1939); *Hill v. Commonwealth*, 239 Ky. 646, 40 S.W. 2d 261 (1931); *Davis v. Commonwealth*, 204 Ky. 809, 265 S.W. 316 (1924).

¹⁰ *Rains v. Commonwealth*, 226 Ky. 173, 10 S.W. 2d 643 (1928).

¹¹ *Thacker v. Commonwealth*, 263 Ky. 97, 91 S.W. 2d 998 (1936).

¹² *Boggs v. Commonwealth*, 285 Ky. 558, 148 S.W. 2d 703 (1941).

¹³ *Hawpe v. Commonwealth*, 234 Ky. 27, 27 S.W. 2d 394 (1930); *Jones v. Commonwealth*, 213 Ky. 356, 281 S.W. 164 (1926).

¹⁴ Cases cited note 8 *supra*; see also *Wims v. State*, 60 Ga. App. 551, 4 S.E. 2d 418 (1939); *State v. Cobo*, 90 Utah 89, 60 P. 2d 952 (1936).

¹⁵ *Largent v. Commonwealth*, 265 Ky. 598, 97 S.W. 2d 538 (1936); *King v. Commonwealth*, 253 Ky. 775, 70 S.W. 2d 667 (1934); *Embry v. Commonwealth*, 236 Ky. 204, 32 S.W. 2d 979 (1931); ROBERSON, KENTUCKY CRIMINAL LAW AND PROCEDURE sec. 392 (2nd ed. 1927).

¹⁶ MORELAND, RATIONALE OF CRIMINAL NEGLIGENCE 37 (1944).

¹⁷ *Nichols v. State*, 187 Ark. 999, 63 S.W. 2d 655 (1933); *People v. Miller*, 114 Cal. App. 293, 299 P. 742 (1931); *State v. Stansell*, 203 N.C. 69 164 S.E. 580 (1932); MAY, *supra* note 8 at 174.

¹⁸ KY. REV. STAT. sec. 435.020 (1948).

¹⁹ TINCER, PROPOSED STATUTORY REFORM IN THE LAW OF NEGLIGENT HOMICIDE IN KENTUCKY, 30 KY. L. J. 341, 351 (1942). The reluctance of juries to dispense extended jail sentences has been replaced by a statutory provision prohibiting any jail sentence in excess of 12 months duration. KY. REV. STAT. sec. 431.075.

involuntary manslaughter in Kentucky. A death which is the result of ordinary negligence is held to constitute the offense.²⁰ Such decisions in effect establish the tort standard of care for involuntary manslaughter. Here, again, Kentucky is in opposition to the overwhelming weight of authority. It is a general principle of criminal law that something more than a lack of ordinary care is requisite to criminal liability.²¹ However, the application of any other higher standard of care to involuntary manslaughter is precluded in Kentucky by the definition of voluntary manslaughter as a homicide resulting from gross negligence. Since involuntary manslaughter is the lesser offense, the standard of care employed must necessarily be lower because the culpable negligence involved in each instance is the basis of liability. Therefore, the only workable standard of care beneath the standard required by Kentucky in its fictitious voluntary negligent manslaughter is ordinary care or the tort standard. Nevertheless, the classification of any negligent manslaughter as a voluntary one is fundamentally erroneous, and this error should not be used to force the law of the sister offense of involuntary manslaughter into the realm of criminal liability for the lack of mere ordinary care.

Although it may be asserted that the classification of certain negligent manslaughters as voluntary manslaughter is justified in Kentucky by the fact that the existing punishment for involuntary manslaughter is not severe enough due to the rule that it is only a common law misdemeanor in Kentucky, such a procedure is erroneous both logically and legally and is a breeder of confusion. Moreover, anomalies of this character are utterly unnecessary although the exigencies of some situations seem to demand them. The obvious answer to Kentucky's primary need in the law of manslaughter is statutory reform—at least a statute placing negligent manslaughter under involuntary manslaughter where it ought to be, and punishing the crime in a degree appropriate to the felony that it is, and defining the standard of care as one appropriate to criminal liability.

JAMES DANIEL CORNETTE

THE RETREAT TO THE WALL DOCTRINE OF SELF-DEFENSE

In order to be excused on the grounds of self-defense in the early law of homicide, it was necessary to gain the king's pardon.¹ Gradually, however, self-defense became a legally recognized excuse for homicide, although some of its most fundamental principles did not fully crystallize until modern times.

At the very beginning the so-called "retreat to the wall" doctrine became a

²⁰ *Embry v. Commonwealth*, 236 Ky. 204, 32 S.W. 2d 979 (1931).

²¹ *State v. Elliott*, 1 Terry 250, 8 A. 2d 873 (Del. 1939); *Pitts v. State*, 132 Fla. 812, 182 So. 234 (1938); *Croker v. State*, 57 Ga. App. 895, 197 S.E. 92 (1938); *People v. Hansen*, 378 Ill. 491, 38 N.E. 2d 738 (1941); *State v. Ela*, 136 Me. 303, 8 A. 2d 589 (1939); *Scott v. State*, 183 Miss. 788, 185 So. 195 (1939); *State v. Carter*, 342 Mo. 439, 116 S.W. 2d 21 (1938); *Commonwealth v. Aurick*, 342 Pa. 282, 19 A. 2d 920 (1941); *State v. Lingman*, 97 Utah 180, 91 P. 2d 457 (1939); *Bell v. Commonwealth*, 170 Va. 597, 195 S.E. 675 (1938); *State v. Lawson*, 128 W. Va. 136, 36 S.E. 2d 26 (1946); MAY, CRIMINAL LAW sec. 174.

¹ POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 478 (2d ed., 1911). "The defendant deserved but needed the king's pardon."

"Beale, *Retreat From a Murderous Assault*, 16 HARV. L. REV. 567 (1903). "[I] is a doctrine of modern, rather than of medieval law."